

***United States Court of Appeals
for the Second Circuit***



APPELLEE'S BRIEF

Docket
No. 75-6127

IN THE
United States Court of Appeals
For the Second Circuit

LEO A. POPP,

Appellant,

— against —

SECRETARY OF HEALTH, EDUCATION AND
WELFARE,

Appellee.

On Appeal from the United States District Court
For the Northern District of New York

BRIEF OF THE APPELLEE

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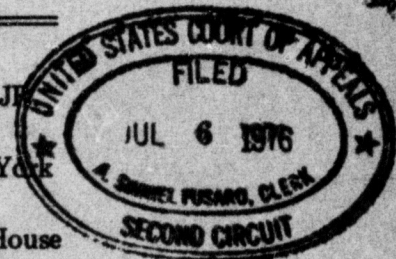




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IN THE
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LEO A. POPP,

Appellant,

-against-

SECRETARY OF HEALTH, EDUCATION AND
WELFARE,

Appellee.

On appeal from the United States District Court
for the Northern District of New York

BRIEF OF THE APPELLEE

STATEMENT OF ISSUES

- I. DID THE DISTRICT COURT PROPERLY UPHOLD THE SECRETARY'S APPLICATION OF ADMINISTRATIVE RES JUDICATA AS FORECLOSING JUDICIAL REVIEW OF THE SECRETARY'S DENIAL OF THE CLAIMANT'S FIRST THREE APPLICATIONS FOR DISABILITY INSURANCE BENEFITS UNDER THE SOCIAL SECURITY ACT.
- II. IS THE FINAL DECISION OF THE SECRETARY, THAT THE CLAIMANT IS NOT UNDER A DISABILITY, WITHIN THE MEANING OF THE SOCIAL SECURITY ACT ON OR AFTER APRIL 9, 1970, AND THAT THE CLAIMANT IS NOT ENTITLED TO DISABILITY INSURANCE BENEFITS, SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE AFFIRMED BY THE CIRCUIT COURT.

STATEMENT OF THE CASE

The Appellant and Claimant, LEO A. POPP, has filed four separate applications seeking to establish a period of disability, and his right to disability insurance benefits under the Social Security Act as amended, (hereinafter, the Act), and specifically under Section 223 of the Act, 42 U.S.C. §423.

Applications were filed by the Claimant on August 9, 1963, July 20, 1966, October 29, 1968, and January 12, 1971, respectively. (R. 9, Tr. 221-224, 360-363; R. 10, Tr. 524-527).

Mr. POPP'S original application alleged that he was disabled, as of January 30, 1963, due to arthritis and diabetes. This initial application was denied at all administrative levels by the Secretary and on March 17, 1965, the Appeals Council declined to review the decision of the Hearing Examiner. (R. 9, Tr. 359). No action was ever commenced by the Claimant in the U.S. District Court to seek judicial review of that first "final" decision of the Secretary.

The Claimant's second application alleged that Mr. POPP had become disabled on July 4, 1956 due to diabetes, arthritis, and a possible heart condition. This second application was also denied by the Secretary

at all administrative levels. On February 23, 1968, the Appeals Council refused to review the Hearing Examiner's October 30, 1967 second "final" decision. Again no civil action was commenced in the District Court.

On October 29, 1968, the third application filed by the Claimant alleged the same period, and identical causes of disability that were stated in Mr. POPP'S second application for benefits. This third application was again denied initially, after reconsideration, and after the Hearing Examiner found that by virtue of the Appeals Council's decision, dated February 23, 1968, which denied the Claimant's second application, the finding was res judicata that the Claimant was not under a disability, as defined under the Act, from July 5, 1956 until February 23, 1968, the date of the Appeals Council's decision. (R.9, Tr. 131-140). That same decision, also concluded that the Claimant was similarly not under any disability during the period of time that had elapsed since the Appeals Council's decision of February 23, 1968. The Claimant's request for a review of the Hearing Examiner's decision of April 9, 1970 was again denied by the Appeals Council. (R. 9, Tr. 1037.) No further action was ever taken by the Claimant with respect to denial of this third application.

The fourth and present application was filed by the Claimant on January 12, 1971. (R.10, Tr. 672-675). This application alleged a disability as a result of diabetes mellitus, arteriosclerotic heart disease, osteoarthritis, and a lumbar vertebrae fracture. The application was denied both initially and on reconsideration. (R.10, Tr.748, 761). On December 21, 1972, the Administrative Law Judge heard the case de novo and found that Mr. POPP was not suffering from a disability within the definition of the Act. (R.9, Tr. 48-54). The appeals Council again denied review of the decision of the Administrative Law Judge. (R.9, Tr. 4-5).

The claimant commenced his first action in the U.S. District Court on May 7, 1973, seeking a judicial review of the Administrative Law Judge's decision of December 21, 1972, denying the Claimant's fourth application for disability insurance benefits. (R. 1-2).

Upon motion of the Secretary, the District Court remanded the case to the Secretary for the taking of additional evidence regarding the Claimant's earnings record. (R. 11-16).

The Appeals Council's decision, dated September 10, 1974, stated that Appellant was not under a disability, as defined under the Act or the regulations since Mr. POPP had been engaged in substantial gainful employment during

the years of 1970, 1971, 1972 and 1973. The Appeals Council, on this remand, also affirmed the December 21, 1972 decision of the Administrative Law Judge. (R.47, Tr. 790-793).

By decision dated August 22, 1975, the District Court, per Chief U.S. District Judge James T. Foley, ruled that the Secretary's decisions, as to the first three applications filed by Mr. POPP, were res judicata and binding upon the District Court and that the final decision of the Secretary, regarding the Secretary's denial of Mr. POPP'S fourth application, was supported by substantial evidence and was therefore entitled to affirmance by the District Court.

ARGUMENT

POINT 1

THE DISTRICT COURT PROPERLY UPHELD THE SECRETARY'S APPLICATION OF ADMINISTRATIVE RES JUDICATA AS FORECLOSING JUDICIAL REVIEW OF THE SECRETARY'S DENIAL OF THE CLAIMANT'S FIRST THREE APPLICATIONS FOR DISABILITY INSURANCE BENEFITS UNDER SOCIAL SECURITY ACT.

In its Memorandum-Decision and Order, dated August 22, 1975, at pages 1-4, the District Court held

that the third "final" decision of the Secretary's Hearing Examiner, dated April 9, 1970, (R.9, Tr. 131-140), and the fourth "final" decision of the Secretary's Administrative Law Judge, dated December 31, 1972, finding that prior determinations by the Secretary, with respect to the first and second applications, (Decisions of Hearing Examiner Rosenzweig, dated December 14, 1964 and October 30, 1967, respectively), and the third application of Mr. POPP (Decision of Hearing Examiner Irwin D. Shapiro, dated April 9, 1970), for disability insurance benefits under the Act were barred from further administrative review by the Secretary, on account of the Claimant's failure to seek timely judicial review of these earlier "final" decisions, was a proper application by the Secretary of the doctrine of administrative res judicata, established by the Secretary's own regulations and recognized by the federal courts, including this Circuit Court.

In support of this conclusion of the lower court, the Circuit Court's attention is directed to 20 C.F.R. §§404.937(a), 404.957(b) and 404.958; Thompson v. Richardson, 452 F.2d 911 (2d Cir. 1971); William Harrington v. Robert Finch, Second Circuit, Docket No.

74-1267; and Cappadora v. Celebrezze, 356 F.2d 1 (2d Cir. 1966).

In Thompson v. Richardson, supra., at page 913, this Court stated,

The Social Security Act, 42 U.S.C. §405(b), authorizes the Secretary of Health, Education and Welfare to set by regulation the time for requesting a hearing, and it is firmly established that, in the absence of exceptional factors, administrative finality (or administrative res judicata) forecloses re-opening or review of adverse determinations which have become final under the regulations. (cites omitted).

In the present case, none of these "exceptional factors" has been established by the Claimant.

It is also well established that a final administrative decision, denying a Claimant's prior applications for disability insurance benefits, establishes, for the purpose of a subsequent application, that the Claimant was not under a disability for the period covered by the earlier application and decision. Leviner v. Richardson, 443 F.2d 1338 (4th Cir. 1971); Moore v. Celebrezze, 252 F.Supp. 593 (E.D.Pa. 1966), aff'd., 376 F.2d 850 (3d Cir. 1967); Domezik v. Cohen, 413 F.2d 5 (3d Cir. 1969); Norkey v. Celebrezze, 225 F.Supp. 754 (E.D.Pa. 1963); James v. Gardner, 384 F.2d 784 (4th Cir. 1967), cert. denied, 390 U.S. 999 (1968); and Easley v. Finch, 431 F.2d 1351 (4th Cir. 1970).

POINT II

THE FINAL DECISION OF THE SECRETARY, THAT THE CLAIMANT IS NOT UNDER A DISABILITY, WITHIN THE MEANING OF THE SOCIAL SECURITY ACT ON OR AFTER APRIL 9, 1970, AND THAT THE CLAIMANT IS NOT ENTITLED TO DISABILITY INSURANCE BENEFITS, IS SUPPORTED BY SUBSTANTIAL EVIDENCE AND SHOULD THEREFORE BE AFFIRMED BY THE CIRCUIT COURT.

In the Secretary's consideration of an application to determine a claimant's eligibility for disability insurance benefits, it is clear that the claimant bears the burden of proving that he is disabled within the meaning of the Act. Timmerman v. Weinberger, 510 F. 2d 439 (8th Cir. 1975); Yawitz v. Weinberger, 498 F. 2d 956 (8th Cir. 1972); Gold v. Secretary of Department of Health, Education and Welfare, 463 F.2d 38 (2d Cir. 1972); Reyes-Robles v. Finch, 409 F.2d 84 (1st Cir. 1969); Gardner v. Richardson, 383 F.Supp 1 (E.D.Pa. 1974); Celani v. Weinberger, 393 F.Supp. 804 (D.Md. 1974); and Serrano v. Secretary of Department of Health, Education and Welfare, 340 F.Supp. 971, (D.P.R. 1972); and 42 U.S.C. §423(d)(5).

It is therefore a prerequisite to his receipt of disability insurance benefits that the claimant satisfy the Secretary that the Act's definition of disability

has been fully met. It is irrelevant that the claimant may have been found "disabled" by another federal or state agency or by a private insurance carrier. 20 C.F.R. §404.1525, Sorenson v. Weinberger, 514 F.2d 1112 (9th Cir. 1975); and Williams v. Weinberger, 373 F.Supp 1110 (W.D. Mo. 1974). The Secretary is authorized under the Act to make his own independent finding. Therefore, the fact that Mr. POPP has been found to be disabled and entitled to benefits by the New York State Teachers Retirement System has no bearing upon the issue of whether Mr. POPP is disabled under the definition of the Social Security Act.

For the purposes of the Act, the term "disability" means -

An individual . . . shall be determined to be under a disability only if his physical or mental impairment or impairments are of such severity that he is not only unable to do his previous work but cannot, considering his age, education, and work experience, engage in any other kind of substantial gainful work which exists in the national economy.
. . . 42 U.S.C. §423(d).

The Act further provides that the findings of the Secretary as to any fact may not be reviewed by any person, tribunal, or governmental agency if supported by substantial evidence. 42 U.S.C. §405(g).

Once substantial evidence and the reasonable inferences and conclusions drawn therefrom have been found to support the Secretary's findings of fact, the findings become conclusive and may not be disturbed by the federal courts on review. The reweighing of evidence is thus solely within the province of the Secretary. Richardson v. Perales, 402 U.S. 389 (1971); Timmerman v. Weinberger, supra; Gold v. Secretary of Health, Education and Welfare, supra.; Gonzalez v. Richardson, 455 F.2d 953 (1st Cir. 1972); and Franklin v. Secretary of Health, Education and Welfare, 393 F.2d 640, (2d Cir. 1968).

The courts are limited to a determination whether substantial evidence existed to support the findings of fact of the Secretary. In reviewing the administrative record for such a determination, the Court's focus should be in four areas: (1) the objective medical evidence submitted; (2) the diagnosis and expert opinions of treating and examining physicians on questions of fact; (3) subjective evidence of pain; and (4) the claimant's education, background, work history, and present age. Timmerman v. Weinberger, supra. .

The medical evidence submitted by the Claimant to support his fourth application for benefits is essentially the same as that submitted by Mr. POPP on

his three previous applications.

A general practitioner, David S. Pointon, M.D., retained by Mr. POPP indicates that on the date of the medical examination, August 22, 1971, Mr. POPP was suffering from diabetes mellitus, longstanding and moderately controlled; moderately generalized arterio-sclerotic heart and vascular disease; osteoarthritis; and an old lumbal vertebral fracture with sciatica. (R. 10, Tr. 782-785).

It should be emphasized that diabetes has been found to be a remedial condition and hence not per se disabling within the meaning of the Social Security Act. Knox v. Finch, 472 F.2d 919 (5th Cir. 1970); Valenti v. Health Education and Welfare, 350 F.Supp. 1027 (E.D. Pa. 1972); and Hunley v. Cohen, 288 F. Supp. 537 (E.D. Tenn. 1968). There were no findings that any of these conditions was then severe or increasing in severity. On the contrary, in view of the fact that these findings have remained basically unchanged from those submitted as early as 1963, and that these same findings were again reaffirmed by Dr. Pointon in 1974, this fact clearly demonstrates that Mr. POPP's conditions have stabilized.

Regarding the alleged disabling back condition, the same 1971 examination showed that although there was some degree of stiffness of the Claimant's back in walking, the pulses in the extremities were good both before and after exercise. The Claimant's condition was not so severe as to prevent Mr. POPP from engaging in any substantial gainful work. Woods v. Finch, 428 F.2d 469 (3d Cir. 1970); Durham v. Gardner, 392 F.2d 168 (4th Cir. 1968); and Serrano v. Secretary of Health, Education and Welfare, supra. .

Although Appellant may very well experience some pain in doing tasks, pain has been held to constitute a "disability" if, and only if, it is of a non-remedial nature and is of such a degree to preclude an individual from engaging in substantial gainful activity. Emmette v. Richardson, 337 F.Supp. 362 (W.D.Va. 1971); Barlett v. Secretary of Department of Health, Education and Welfare, 330 F.Supp. 1273 (E.D. Ky. 1971); Harvey v. Finch, 313 F.Supp. 323 (N.D.Cal. 1970), aff'd., 451 F.2d 589 (9th Cir. 1971); and Calpin v. Finch, 316 F. Supp. 17 (W.D. Pa. 1970).

The test is not whether the individual is able to work completely free from pain, but whether the pain is itself a disabling factor. Calpin v. Finch, supra. .

In the instant case, there was no objective data that would support a contention that the Claimant's pain, if it existed, is of a disabling nature. Claimant must establish the existence and the severity of such pain by more than mere allegations. 42 U.S.C. §423 (d)(5); Noe v. Weinberger, 512 F.2d 588 (6th Cir. 1975); Bittel v. Richardson 441 F.2d 1193 (3d Cir. 1971); Reyes-Robles v. Finch, supra.; and Franklin v. Secretary of Health, Education and Welfare, supra. . Moreover, it must be remembered that the legislative history of the Act "commands skepticism" with respect to any evaluation based on subjective statements of pain unsupported by objective evidence. Scherillo v. Richardson, CCH UIR Vol. 1, Fed. Para. 16,808 E.D.N.Y. 1972.

Additionally, the most conclusive evidence supporting the Secretary's final decision stems from Mr. POPP's work earnings record. It should be noted that in order to be deemed "disabled" under the Act, the Claimant must be unable to participate in any substantial gainful activity, without regard as to whether he is precluded from working in the same type of employment previously held, and without regard as to whether the claimant is actually employed. The Act focuses on ability to be employed and not on actual employment. 42 U.S.C. 423(d)(2)(A).

During the period of time in question, the record clearly establishes that Mr. POPP was frequently employed as a substitute teacher, as a Supervisor of the Town of Ephratah, New York and as Supervisor of the County of Fulton, New York and that he simultaneously ran the family farm.

The Secretary's regulations, which govern the determination of when an individual is engaged in substantial gainful activity, state, in pertinent part:

In general. If an individual performed work during any period in which he alleges that he was under a disability as defined in §404.1501, the work performed may demonstrate that such individual has ability to engage in substantial gainful activity. . . .

Nature of the work. The performance of duties involving skill, experience or responsibility, or contributing substantially to the operation of an enterprise is evidence tending to show that an individual has ability to engage in substantial gainful activity.

Adequacy of performance. The adequacy of an individual's performance of assigned work is also evidence as to whether or not he has ability to engage in substantial gainful activity. The satisfactory performance of assignments may demonstrate ability to engage in substantial gainful activity. . .

Activities in carrying on a trade or business. Supervisory, managerial, advisory or other significant personal services rendered by a self-employed individual demonstrate an ability to engage in substantial gainful activity. 20 C.F.R. §404.1532.

Furthermore, the regulations further provide that the amount of earnings of a claimant, during a period of alleged disability, shall enter into the consideration of the Secretary in his determining whether the claimant was engaged in substantial gainful activity. 20 C.F.R. §404.1534(a). The regulations state that earnings in excess of \$140.00 per month shall be deemed to demonstrate the claimant's ability to engage in substantial gainful activity absent any circumstances which would mitigate the effect of the substantial earnings. 20 C.F.R. §404.1534(b).

Appellant's earnings records indicate that for every year during the period of time in question, with the exception of 1972, he had earnings in excess of \$140.00 per month. (R. 10, Tr. 721, 798-818, R. 125, Tr. 877-884). In addition to the earnings from Supervisor's duties and from substitute teaching, Appellant also operated a truck farm with the help of his family. Although the farm was operated at a net loss, the farm did gross over \$8,000 in 1971 and over \$5,800 in 1972 (R. 47, Tr. 802, 809) which also indicates the Appellant's ability to engage in substantial gainful activity as stated in the regulations, 20 C.F.R. §404.1534(e).

Furthermore, even if there was a showing made that Mr. POPP was unable to work full-time, but could engage in substantial gainful activity only on a part-time basis, that in and of itself could not be determinative of a finding of a disability.

"In order for work activity to be substantial, it is not necessary that it be performed on a full-time basis It is immaterial that the work activity of an individual may be less, or less responsible, or less gainful, than that in which he was engaged before the onset of his impairment." 20 C.F.R. 1532(b).

As is clearly shown by the record, the Appellant is not lacking in the capacity nor the ability to engage in substantial gainful activity, although it may very well be that he has been unable to secure full time employment on account of his lack of motivation. The inability to secure full time employment, or the unwillingness to accept it, is not one of the considerations in determining Appellant's eligibility for benefits. ⁴² U.S.C. §423(d)(2)(A); 20 C.F.R. §404.1502(b); Labee v. Cohen, 408 F.2d 998 (5th Cir. 1969); Bailey v. Finch, 300 F.Supp. 232 (W.D.Ark. 1969); and Dye v. Finch, 299 F. Supp. 481 (W.D.Va 1969).

In view of the weight of the evidence, it is clear that Appellant does not fall within the Act's definition of a disabled person. The evidence clearly

demonstrates that Mr. POPP continued to work, and to be "engaged in substantial gainful activity," within the meaning of the Act throughout the entire period covered by his fourth application.

CONCLUSION

The judgment of the United States District Court for the Northern District of New York, affirming the final decision of the Secretary of Health, Education and Welfare, that the Claimant is not entitled to a period of disability or to disability insurance benefits under the Social Security Act, and dismissing the Plaintiff's complaint with prejudice, should in all respects be affirmed.

Respectfully submitted,

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Re **LEO A. POPP** against the Secretary of Health, Education and
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County of Onondaga) ss.:
City of Syracuse)

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U. S. Attorney

Attorney() for **Appellee**

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